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**Summary of Proposed 2008 Amendments to the
Attorney General's Brownfields Covenant Regulations, 940 CMR 23.00**

BACKGROUND

The Attorney General enters into Brownfields Covenant Not to Sue Agreements, commonly called Brownfields Covenants, with people who are willing to clean up and redevelop contaminated land, but, in order to do so, need protection from the broad scope of liability that attaches to owners and operators of contaminated land under Chapter 21E, the Commonwealth's waste site cleanup law. The authority to enter into Brownfields Covenants was provided by Chapter 206 of the Acts of 1998, known as the Brownfields Act, and was codified at G.L. c. 21E, § 3A(j)(3). Most brownfields are redeveloped with the benefit of liability protections under Chapter 21E that operate automatically. Brownfields Covenants are appropriate for the most challenging properties that need site-specific attention to give developers the confidence to take on a contaminated property.

Brownfields Covenants provide current and prospective property owners protection from certain claims by the Commonwealth and third parties for cleanup costs and property damage in exchange for commitments to clean up in accordance with state standards and redevelop in ways that contribute to the physical or economic revitalization of the community. The Attorney General adopted the Attorney General's Brownfields Covenant Regulations, 940 CMR 23.00, in 1999 to create procedures and substantive criteria for obtaining Brownfields Covenants, and began entering into Brownfields Covenants in 2000.

In order to update the Brownfields Covenant Program to reflect the current needs of brownfields redevelopment, the Office of the Attorney General completed a review of the program, with public comments, discussion groups, and meetings with public and private stakeholders throughout the Commonwealth between April and September of 2007. Many comments, and the experience of the Attorney General's Brownfields Unit since 1999, suggest that certain changes and clarifications to the regulations would make applying for a Brownfields Covenant more efficient and useful, and therefore increase the number of contaminated properties that Brownfields Covenants could help, without sacrificing the Commonwealth's cleanup standards or other environmental goals.

The Attorney General now publishes for public comment proposed amendments intended to create a more streamlined and clear application, negotiation and public comment process. The Attorney General's Office expects that the automatic liability protection provisions of Chapter 21E will continue to provide sufficient liability protection for most brownfields redevelopment, making Brownfields Covenants unnecessary for most sites. Where Brownfields Covenants are necessary to resolve liability concerns, however, the proposed amendments will help maximize the Attorney General's ability to serve property owners, developers and communities interested in cleaning up brownfields.

SUMMARY OF PRINCIPLE AMENDMENTS

1.) CHANGING THE NOTICE PROVISIONS TO FOCUS ON PROPERTIES MOST LIKELY TO BE AFFECTED

We ease and clarify the notification requirements, now found at 940 CMR 23.04 (2), without sacrificing effective notice to those most likely to be affected by a site and have legal rights affected by a Brownfields Covenant. When pollution migrates from a source property onto other properties, the “site” for Chapter 21E purposes is wherever the pollution goes. Actual notice (either in-hand or by certified mail) to the owners of all properties within the site is critical. We amend the regulations to make clear that, where the site encompasses more properties than the property at which the redevelopment project is proposed (the “Project Property”), additional actual notice to abutters of properties that are within the site but that are not the Project Property is not necessary, unless these properties have a significant chance of being within the site in the future (e.g. downgradient properties which are likely to be affected by a moving plume of contaminated groundwater before response actions can begin). We expect that an applicant will rely on a Licensed Site Professional to determine, based on contaminant properties and site conditions (e.g. groundwater or surface water flow), if there are any such properties with a significant to become part of the site in the future. In addition to these notice requirements based on the known and expected site boundaries, we retain the other actual notice requirements, including notice to all abutters of the Project Property, whether they are suspected of being directly affected or not, as an extra protective mechanism to ensure those most likely to be affected are notified. We also retain the requirements for newspaper and Environmental Monitor notice so that the community in general and other interested parties are put on notice.

2.) SHORTENING PUBLIC COMMENT PERIOD WHEN APPLICANT IS ELIGIBLE PERSON.

Experience suggests that the current 90 day comment period, although appropriate in other circumstances, is unnecessarily long when an applicant meets the definition of “eligible person” under Chapter 21E (i.e., did not cause or contribute to the contamination and did not own or operate the site at the time of the contamination). There are three main purposes served by the comment period: (1) an opportunity for those who have claims against the applicant to come forward before their legal rights are cut off; (2) an opportunity for someone to request to join the agreement; and (3) an opportunity for general comment on a proposed project. When the applicant is an eligible person, there are unlikely to be meritorious third party claims that need to be considered, and 30 days is likely adequate for people to assess and raise their other interests to our attention. This does not mean that negotiation of a Brownfields Covenant will necessarily be completed at the end of the 30-day comment period; meritorious third party requests to join, or deal-related issues out the Attorney General’s control, may require more time. We also retain the ability to have additional public input beyond the 30 days when necessary. The change will, however, allow for earlier completion than 90 days in the appropriate cases.

We propose three changes in 940 CMR 23.04 related to the comment period: (1) we shorten the comment period for applications by eligible persons to 30 days, while retaining a 90 day comment period for non-eligible persons; (2) we shorten the period after application for the applicant to perform the notice requirements; and (3) we make the comment period a fixed period running from the time of application, as opposed to a period running from the time notice is given, in order to make it easier for applicants and third parties to know how long the comment period lasts.

3.) CLARIFYING WHO MAY PARTICIPATE IN COVENANT NEGOTIATIONS.

Because the regulations currently give no explanation for what roles third parties may play in the process, there is some fear of the unknown among the development community, and confusion among those who might comment. Following the language of Chapter 21E, the regulations give affected third parties “notice of an opportunity to join the covenant not to sue agreement,” but do not describe what joining means or the circumstances in which it would be allowed. The regulations also do not expressly address the other two main purposes served by the comment period: an opportunity for those who have claims against the applicant to come forward before their legal rights are cut off; and an opportunity for general comment on a proposed project. The proposed changes to the regulations spell out how each type of comment will be handled.

In practice, it is rare for public comments to slow down the negotiation of a Brownfields Covenant. This is because there are often few comments, and because it has been the Attorney General’s policy to limit active involvement in the negotiation process to those who have a legal right directly affected by a proposed agreement. It is our policy to respond to all commenters in some way, but this often requires simply explaining the program and answering questions.

The proposed changes to 940 CMR 23.06(3) try to make clear that there are two circumstances when an affected third party’s rights should be considered in negotiation of the agreement: when a third party steps forward with a site-related claim against the applicant; and when a third party requests to join the agreement to have its own potential site-related liability limited. The former is likely to happen only if the applicant is a current owner who does not qualify as an eligible person. The Attorney General’s approach is to encourage the claimant and the applicant to resolve the matter outside of the agreement during the covenant negotiation period; if this is not possible, the Attorney General may determine that the third party’s rights should be protected in the agreement, either through allowing the party to join in some manner or by making sure that the claimant’s rights are not cut off by the agreement.

The Attorney General has also allowed parties to join an agreement when they contribute to the cleanup or redevelopment in a significant enough way that they qualify for the same protections, upon the same terms, as the applicant. The proposed changes make this explicit.

4.) ALLOWING COVENANTS TO VEST IMMEDIATELY WHEN THE REMEDIAL PLAN INCLUDES THE POSSIBILITY OF A TEMPORARY SOLUTION

Chapter 21E allows for Brownfields Covenants when a temporary solution is necessary at a site “if the person to whom such covenant is provided is an eligible person as defined in section 2, and such person can demonstrate that it is not feasible to achieve a permanent solution for the site.” G.L. c. 21E, § 3A(j)(3)(a)(ii). Currently the Brownfields Covenant Regulations, at 940 CMR 23.08(7), say that liability relief will not vest with respect to a site where only a temporary solution will be achieved prior to the submittal of an opinion by a Licensed Site Professional that a permanent solution is not feasible. The decision about whether a Permanent Solution is feasible, however, may be impossible until a significant time after an applicant takes ownership and performs further appropriate site assessment. The proposed change allows liability relief to vest right away when a temporary solution may be necessary. The change is intended as an incentive for eligible persons to tackle the most technically complicated sites. It will be the Attorney General’s policy to require permanent solutions or remedy operation status in all agreements unless we receive some specific information that a Temporary Solution may be necessary.

5.) ELIMINATING THE REQUIREMENT THAT A RELEASE TRACKING NUMBER ALREADY EXIST FOR A SITE

The current requirement that a site have a Release Tracking Number (RTN) issued by the Department of Environmental Protection before the Attorney General will enter into a Brownfields Covenant poses no obstacle to applicants in most cases, because sites that have been assessed adequately for development plans typically have an RTN. This is not true in all cases, however. There may be circumstances in which applicants who do not have control of the site of the proposed project cannot force a proper release notification to occur, and yet are able to assess the site enough to prepare a remedial and project plan. For these reasons, we propose eliminating the RTN requirement from the prerequisites for entering into agreements at 940 CMR 23.03(1). The Attorney General will still be looking for RTN information if it exists and, whether an RTN exists or not, enough information for each release that will be addressed by the Brownfields Covenant to review a proposed project adequately. This change does not mean that Brownfields Covenants will address releases that are unknown at the time of the agreement.

6.) INCORPORATING SEVERAL OTHER CHANGES TO PROMOTE CLARITY

- (a)** Making express the long-held policy that a project is presumed to contribute to the economic or physical revitalization of the community, and therefore be an Eligible Brownfields Project, if it has the support of the municipality in which the project is located.
- (b)** Eliminating reference to settlement of liability under G.L. c. 21E §3A(j)(2). References to Section 3A(j)(2), which allows people another method of resolving certain site-related liability, were included in order to consider requests for liability protection under both 3A(j)(2) and 3A(j)(3) as efficiently as possible. There is not, however, an easy procedural fit between Brownfields Covenants and agreements under Section 3A(j)(2), which require public notice after, not before, an agreement is negotiated. The Attorney General has also not been presented with circumstances in which a request under Section 3A(j)(2) was an appropriate alternative to a Brownfields Covenant. For these reasons, we propose to eliminate the reference to Section 3A(j)(2).
- (c)** Placing the public notice requirements in 940 CMR 23.04, the same section as the application requirements, in order to put all procedural requirements together and avoid having applicants miss the notice requirements.
- (d)** Adding a reference in 940 CMR 23.08(1) to possible protections for natural resource damages, in order to make explicit the Attorney General's long-standing policy of adding these protections to an agreement where appropriate and where the Secretary of Energy and Environmental Affairs agrees.
- (e)** Changing the description of the protections available to applicants to match the statutory language: "claims for contribution, response action costs or for property damage pursuant to (M.G.L. c. 21E) or for property damage under the common law." This is not a substantive change in available protections; it is solely an effort to use consistent language.

940 CMR 23.00: Brownfields Covenant Not to Sue Agreements

Section

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- 23.02: Definitions
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- 23.09: Termination for Cause
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23.01: Scope and Purpose

Chapter 206 of the Acts of 1998, [known as the Brownfields Act](#), was designed to encourage the cleanup and re-use of contaminated and under-utilized properties, which are commonly known as “brownfields.” The Act modified the liability rules of [M.G.L. c. 21E to help prevent the liability attaching to owners and operators of contaminated property from acting as a disincentive to buying, assessing, cleaning up, and redeveloping these sites. The Brownfields Act created some exemptions from liability which operate automatically by the terms of M.G.L. c. 21E. The provisions of the Act giving direct relief provide](#) an extra push to help turn around the sites that the market comes close to turning around on its own. The Act [created another tool for limiting liability, Brownfields Covenant Not Sue Agreements, out of recognition](#) that there may be situations where it is appropriate for the Commonwealth to provide additional liability relief as an incentive to spur the cleanup and re-use of brownfields. [Section 3A\(j\)\(3\) of M.G.L. c. 21E, inserted by the Act, authorizes the Commonwealth to enter into Brownfields Covenants Not to Sue Agreements to provide current or prospective owners and operators with individually tailored liability relief that goes beyond that provided directly by the Act. These regulations are designed to spell out when the Commonwealth can and should enter into such agreements.](#)

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23.02: Definitions

[Activity and Use Limitation shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.](#)

[Affected Third Parties](#) means those Persons with potential claims against an Applicant for contribution, [Response Action costs or for property damage](#) pursuant to M.G.L. c. 21E or for property damage [under the common law](#), who have received notice and an opportunity to join a Brownfields Covenant Not to Sue Agreement pursuant to 940 CMR

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23.06.

Applicant means a Person seeking to enter into a Brownfields Covenant Not to Sue Agreement with the Commonwealth.

Attorney General means the Attorney General or his or her designee.

Brownfields Covenant Not to Sue Agreement or Agreement means an agreement authorized by M.G.L. c. 21E, s. 3A(j)(3), entered into between the Commonwealth and a current or prospective Owner or Operator of a Site.

Development Plan means a plan submitted in accordance with 940 CMR 23.04(2).

Downgradient Property Status shall have the same meaning as that used in 310 CMR 40.0180.

Economically Distressed Area shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

Eligible Brownfields Project means a development project on a Site or portion of a Site that will contribute to the economic or physical revitalization of the community in which the Site is located by providing one or more of the following public benefits:

- (a) new, permanent jobs;
- (b) affordable housing benefits;
- (c) historic preservation;
- (d) the creation or revitalization of open space; or
- (e) some other public benefit to the community in which the Site that includes the project is located, as determined by the Attorney General.

A project that provides any of the benefits listed in (a) through (d) of this definition will be presumed to contribute to the economic or physical revitalization of the community in which it is located. A project that has support from the chief executive officer of the municipality in which the project is located will be presumed to contribute to the economic or physical revitalization of the community in which it is located.

Eligible Person shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

Eligible Person Certification means a certification made on a form prescribed by the Attorney General that is designed to provide the Attorney General with a basis for evaluating whether an Applicant who wishes to be considered an Eligible Person is an Eligible Person. The certification shall describe the periods of the Applicant's ownership or operation of the Site that is the subject of the Agreement, the nature of the Applicant's activities at the Site, and the use that the Applicant made of Oil or Hazardous Materials at the Site, and it shall provide such other information deemed by the Attorney General to be relevant in evaluating whether the Applicant is an Eligible Person. The certification shall be signed under pains and penalties of perjury by the Applicant's employee(s) with the most knowledge of the issues that are the subject matter of the certification.

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Environmental Monitor means the publication of that name issued by the MEPA Unit of the Massachusetts Executive Office of Energy and Environmental Affairs.

Exposure shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

Feasible shall have the same meaning as that used in 310 CMR 40.0860.

Hazardous Material shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

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Licensed Site Professional means a waste site cleanup professional licensed pursuant to M.G.L. c. 21A, s. 19 through 19J.

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MCP means the regulations promulgated by the Department of Environmental Protection that are known as the Massachusetts Contingency Plan, and that appear at 310 CMR 40.0000.

Notice of Responsibility shall have the same meaning as that set forth in 310 CMR 40.0006.

Notice of Rights of Affected Third Parties means the notice form that Applicants must complete and distribute pursuant to 940 CMR 23.06(1) if they are seeking liability protection against third party claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law.

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Oil shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

Operator shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

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Owner shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

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Permanent Solution shall have the same meaning as that set forth in 310 CMR 40.0006.

Person shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

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Proposed Remediation Status means the level of remediation proposed by an Applicant for the Site that is the subject of the Brownfields Covenant Not to Sue Agreement, including a Permanent Solution, Remedy Operation Status, or Temporary Solution.

Release shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

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Release Tracking Number shall have the same meaning as that set forth in 310 CMR 40.0006.

Remedy Operation Status shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and used in 310 CMR 40.0893.

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Response Action shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

Secretary of Energy and Environmental Affairs means the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs or his or her designee.

Site shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

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Standard of Care shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2.

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Subsequent Owner or Operator means a Person who first begins ownership or operation of the property that is subject to a Brownfields Covenant Not to Sue Agreement subsequent to execution of that Agreement.

Temporary Solution shall have the same meaning as that set forth in 310 CMR 40.0006.

Threat of Release shall have the same meaning as that set forth in M.G.L. c. 21E, s. 2, and in 310 CMR 40.0006.

23.03: Criteria for When to Execute Brownfields Covenant Not to Sue Agreements

(1) The Commonwealth may enter into a Brownfields Covenant Not to Sue Agreement only if all of the following criteria are met:

(a) the Applicant is a current or prospective Owner or Operator of the Site or portion of the Site that is the subject of the proposed Agreement;

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(b) the proposed future use of the Site or portion of the Site that is the subject of the proposed Agreement is an Eligible Brownfields Project;

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(c) a Development Plan describing the proposed use of the Site or portion of the Site that is the subject of the proposed Agreement and the proposed public benefits that such use would bring has been submitted in accordance with 940 CMR 23.04(2);

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(d) a Permanent Solution or Remedy Operation Status has been or will be achieved and maintained in accordance with the terms of M.G.L. c. 21E and the

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MCP (310 CMR 40.0000) for the Site or portion of the Site that is subject to the proposed Agreement; or, if the Applicant is an Eligible Person, a Temporary Solution has been or will be achieved and maintained for the Site or portion of the Site that is subject to the Agreement, if achieving a Permanent Solution is not Feasible pursuant to the provisions of 310 CMR 40.0860;

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(e) a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire portion of a Site that is, or will be, owned or operated by the Applicant;

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(f) there is a substantial likelihood that the proposed Eligible Brownfields Project would not occur without its being the subject of a Brownfields Covenant Not to Sue Agreement;

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(g) the Applicant has negotiated a settlement of costs incurred by the Commonwealth in responding to a Release or Threat of Release at or from the Site that is the subject of the proposed Agreement, and for which the Applicant is potentially liable pursuant to M.G.L. c. 21E, s. 5, provided, however, that in the negotiation of an appropriate settlement, the Commonwealth has considered all relevant factors, including but not limited to: the ability of the Applicant to pay such costs; whether the Applicant is an Eligible Person; and the economic benefits to the community that the Eligible Brownfields Project will bring, including but not limited to future jobs gains and economic revitalization;

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(h) the Applicant has agreed that any liability relief obtained as a result of its entering into a Brownfields Covenant Not to Sue Agreement is subject to the Applicant's being bound by the terms of 940 CMR 23.08 and by any specific terms set forth in the Agreement; and

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(i) an applicant who is not an Eligible Person and who is seeking liability protection against Affected Third Parties has adequately accommodated any bona fide third party claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law.

(2) The Attorney General will enter into a Brownfields Covenant Not to Sue Agreement upon determining that the criteria set forth in 940 CMR 23.03(1) have been met and that entering into the Agreement will likely further the public interest.

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(3) Whether the Commonwealth should enter into a Brownfields Covenant Not to Sue Agreement is subject to the discretion of the Attorney General, and the Attorney General reserves the right to deny an application for such an Agreement on any legally permissible grounds. In exercising his or her discretion on whether to enter into a Brownfields Covenant Not to Sue Agreement, the Attorney General may consider the following factors:

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(a) whether the plans for the proposed project have ripened to the point that the project is amenable to review;

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(b) whether the

(b) the likelihood that the proposed project will actually be undertaken;

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(c) the extent to which a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project is located. Applications filed by Applicants who are not Eligible Persons will be presumed not to qualify for a Brownfields Covenant Not to Sue Agreement when a Permanent Solution or Remedy Operation Status has been proposed for less than the entire Site;

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(d) the extent of the public benefits offered by the Eligible Brownfields Project, and whether such benefits are commensurate with the liability protection being requested;

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(e) for an Applicant who has requested to be considered an Eligible Person, the extent to which that Applicant has demonstrated that he or she is an Eligible Person;

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(f) whether the Applicant has adequately accommodated, or the proposed Agreement adequately accommodates, the rights of Affected Third Parties, as appropriate under 940 CMR 23.06; and

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(g) whether an Applicant has provided the Attorney General with information that the Attorney General has determined is necessary or appropriate for the Attorney General to complete his or her review.

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23.04: Procedures: Application and Public Notice

(1) Applications

(a) Each Applicant shall submit to the Attorney General an application to enter into a Brownfields Covenant Not to Sue Agreement on forms prescribed by the Attorney General.

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(b) Each application shall include a Development Plan that contains, in sufficient detail to allow the Attorney General to conduct an adequate review of the application, a description of the following aspects of the Applicant's proposal:

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(1) the property that is the subject of the proposed Agreement, described in a clear and concise manner sufficient to identify it to the general public, including a map of the property that is the subject of the proposed Agreement (and, if different, for the Site as a whole);

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(2) a reference to the most recent deed or certificate of title for the property that is the subject of the proposed Agreement, including the book and page number at the relevant Registry of Deeds or the Land Court Registration number;

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(3) the Proposed Remediation Status for the property that is the subject of the proposed Agreement (and, if different, for the Site as a whole), and a description of how such remediation will be achieved, with reference to all known and suspected Releases at the Site, the date that any Releases were reported to the Department of Environmental Protection, and any Release Tracking Number(s) for the Site;

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(4) the proposed use of the property that is the subject of the proposed Agreement (and, if different, the use of the Site as a whole) after the Proposed Remediation Status has been achieved;

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(5) how the proposed use of the property that is the subject of the proposed Agreement will contribute to the economic or physical revitalization of the community in which it is located, focusing on how the proposed project will create new, permanent jobs, result in affordable housing benefits, provide historic preservation, create or revitalize open space, or provide some other public benefit;

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(6) how the proposed use of the property that is the subject of the proposed Agreement complies or will comply with applicable zoning and land use permitting requirements;

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(7) the public outreach that has been done to date, the current level of community support for, or opposition to, the Applicant's proposed project (with specific references to all local officials, community groups, and abutters who have been contacted), and plans for any future outreach;

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(8) the current status of the Applicant's proposed project and a schedule setting forth specific milestones for bringing the project to fruition; and

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(9) the current status of the funding for the Applicant's proposed project and how full funding of the project will be achieved.

Deleted: . (j) the Release Tracking Number(s) for the Site and the date when such number(s) was assigned; ¶
 . (k) a map of the property that is the subject of the proposed Agreement (and, if different, for the Site as a whole); and¶
 . (l) the date that the Release(s) at issue were reported to the Department of Environmental Protection.¶
 ¶
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(c) An Applicant shall specify what liability relief he or she is seeking, why that request is justified, and why the liability relief provided directly by statute is not sufficient.

(d) An Applicant who wants to be considered an Eligible Person, shall so specify in his or her application and shall include with such application an Eligible Person Certification on a form prescribed by the Attorney General; provided, however, that an Applicant who can demonstrate that he or she first began or will begin his

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or her ownership or operation at the Site after a Release at such Site was reported to the Department of Environmental Protection need not include such certification, unless so requested by the Attorney General. An Eligible Person Certification is intended to be used solely for deciding under what conditions the Attorney General should enter into Brownfields Covenant Not to Sue Agreements, and neither such a certification nor the Attorney General's use of it shall be considered evidence of whether a Person is an Eligible Person in any other proceeding.

(e) An Applicant who is an Eligible Person and who is proposing a Temporary Solution at the Site or portion of the Site that is the subject of the proposed Agreement shall include with his or her application an opinion issued by a Licensed Site Professional pursuant to 310 CMR 40.0860 stating with particularity the basis on which he or she believes that a Permanent Solution is not Feasible or shall explain when such an opinion will be provided to the Department of Environmental Protection.

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(f) An Applicant who is an Eligible Person and who is proposing a cleanup plan which may, but will not necessarily, include a Temporary Solution at the Site or portion of the Site that is the subject of the proposed Agreement shall state in the Application that he or she is not able to determine at the time of application whether a Permanent Solution is Feasible, and shall explain, to the degree it is known, when such a determination will be made.

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(g) An Applicant who is proposing a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, for less than the entire Site shall explain why his or her request for a Brownfields Covenant Not to Sue Agreement is nevertheless appropriate.

(h) An Applicant should also specify whether he or she is seeking liability protection against claims brought by third parties claims brought by the Commonwealth, or both.

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(i) An Applicant shall provide such further information as the Attorney General deems necessary or appropriate in his or her discretion.

(2) Public Notice. An Applicant seeking protection against third party claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, shall provide notice of this intent as follows:

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(a) the Applicant shall complete a Notice of Rights of Affected Third Parties on forms provided by the Attorney General and shall submit a completed form to the Attorney General appended to his or her application. The notice shall state the date of application, identify the property that is the subject of the proposed Agreement, the Site and Releases at issue, contain a summary of the terms of the application, state how and where copies of the application may be obtained, and

state that any persons who choose to do so may seek to comment on the Application or join the Agreement by contacting the Attorney General in a specified manner. If the Applicant is an Eligible Person, the notice shall state that the notice period closes 30 days after the date of application. If the applicant is not an Eligible Person, the notice shall state that the notice period closes 90 days after the date of application.

(b) no later than 5 days after submitting an application, the Applicant shall provide a copy of the application together with his or her completed Notice of Rights of Affected Third Parties form either in hand or by registered mail, return receipt, to:

(1) all owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for the preceding 50 years for all property currently within the Site; all current owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for property not currently within the Site but with a significant chance to be part of the Site in the future;

(2) all Persons who have received a Notice of Responsibility for the Site from the Department of Environmental Protection pursuant to M.G.L. c. 21E, s. 4;

(3) any Person who has filed for Downgradient Property Status with respect to the Site pursuant to 310 CMR 40.0180;

(4) all owners of record of land abutting the property to be owned or operated by the Applicant that is the subject of the proposed Agreement; any Person who has notified the Applicant that he or she has a potential claim against the Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law; and

(5) any Person who the Applicant has reason to believe has a potential claim against the Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law;

(c) the Applicant shall cause the Notice of Rights of Affected Third Parties to be published in the next available Environmental Monitor after the date of Application; and

(d) no later than 15 days after submitting his or her application, the Applicant shall cause the Notice of Rights of Affected Third Parties to be published in a newspaper published in the municipalities in which the Site lies once per week for

two successive weeks. If no newspaper is published in such municipalities, notice may be published in a newspaper with general circulation where the Site is located. A newspaper which by its title page purports to be printed or published in such municipalities, and having a circulation therein, shall be sufficient for the purpose of providing notice by publication pursuant to this paragraph.

23.05: Priorities

In entering into Brownfields Covenant Not to Sue Agreements, the Commonwealth shall give first priority to Sites located in the 15 cities with the highest poverty rate in the Commonwealth, second priority to Sites located in an Economically Distressed Area, and third priority to all other Sites. The identification of the fifteen cities with the highest poverty rate will be determined using United States census data compiled by the Donahue Institute's Economic and Public Policy Research Unit at the University of Massachusetts at Amherst.

23.06: Rights of Affected Third Parties

(1) Before executing a Brownfields Covenant Not to Sue Agreement with an Applicant who is seeking liability relief against claims brought by third parties, the Attorney General will provide Affected Third Parties an opportunity to comment on the Application or join the Agreement as appropriate under the specific circumstances presented.

(2) Any Affected Third Party may provide comments, during the comment period, to the Attorney General on an Applicant's proposed project.

(3) If an Affected Third Party demonstrates to the Attorney General within the comment period that he or she has the basis for a bona fide claim against an Applicant for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law that is related to the Site that is the subject of a proposed Agreement, the Attorney General may ask an Applicant to accommodate or otherwise respond to this claim or may make an Agreement not applicable to this claim.

(4) The Attorney General may allow an Affected Third Party to join an Agreement when he or she finds that:

(a) the Affected Third Party has contributed, or will contribute, significantly to Site remediation or the proposed Eligible Brownfields Project, and the Affected Third Party agrees that any liability relief obtained as a result of its entering into an Agreement is subject to the Affected Third Party's being bound by the terms of 940 CMR 23.08 and by any specific terms set forth in the Agreement; or

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. (a) the Applicant shall complete a Notice of Rights of Affected Third Parties on forms provided by the Attorney General and shall submit such completed form to the Attorney General appended to his/her application. Said notice shall identify the Site and Releases at issue, contain a summary of the terms of the application, state how and where copies of the application may be obtained, and state that any persons who choose to do so may, within 90 calendar days, seek to join that Agreement by contacting the Attorney General in a specified manner; ¶

. (b) within ten (10) business days of submitting his/her application, the Applicant shall provide a copy of the application together with his/her completed Notice of Rights of Affected Third Parties form either in hand or by registered mail, return receipt, to:¶

(1) all owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for the preceding fifty (50) years for all property within the Site;¶

. (2) all Persons who have received a Notice of Responsibility from the Department of Environmental Protection pursuant to M.G.L. c. 21E, § 4; ¶

. (3) any Person who has filed for Downgradient Property Status from the Department of Environmental Protection pursuant to 310 CMR 40.0180;¶

. (4) all owners of record of land abutting the Site that is the subject of the Agreement;¶

. (5) any Person who has notified ... [1]

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Deleted: (3) In determining the nature and extent of the opportunity that Affected Third Parties will have to join an Agreement, the Attorney General may consider the following factors:

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. (b) the extent to which the remediation that will be achieved will be a Permanent Solution;¶

(c) whether a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the pr ... [2]

(b) allowing the Affected Third Party to join the Agreement will otherwise resolve Site-related liability and is likely to further the public interest

23.07: Public Input

(1) In addition to the notice requirement in 940 CMR 23.04(2), the Attorney General may require whatever additional public process, if any, he or she deems appropriate under the specific circumstances presented.

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(2) In determining what additional public notice and comment process, if any, is appropriate, the Attorney General may consider:

(a) the degree of liability relief that the Applicant is seeking;

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(b) the extent that the remediation that will be achieved will be a Permanent Solution;

(c) whether a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project is located;

(d) whether the Applicant is an Eligible Person;

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(e) the scope of the likely impacts of the Applicant's proposed project;

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(f) the extent to which there are other available processes through which the public will have an opportunity to comment; and

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(g) any other factor the Attorney General deems appropriate;

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(3) The Attorney General will presume that no public process in addition to that prescribed in 940 CMR 23.04(2) will be required where the Applicant is an Eligible Person; the proposed remediation is a Permanent Solution for the entire Site; and the Eligible Brownfields Project has the expressed support of the chief executive officer of the municipality in which the project is located.

(4) In order to prevent duplication, the Attorney General will seek to coordinate any public process required pursuant to 940 CMR 23.07(1) with other available public comment processes to the extent possible.

23.08: Liability Relief Obtained

(1) A Person who has entered into a Brownfields Covenant Not to Sue Agreement with the Commonwealth shall not be liable to the Commonwealth for claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property

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damage under the common law, with respect to matters and properties expressly addressed by said Agreement, provided, however, that the Agreement shall not affect any liability established by contract. A Brownfields Covenant Not to Sue Agreement may also cover claims for natural resource damages, if an applicant so requests and the Secretary of Energy and Environmental Affairs agrees to become a signatory to the Agreement. A Brownfields Covenant Not to Sue Agreement shall not relieve any Person of liability with respect to any matter or property not expressly addressed by the Agreement. Nothing in this paragraph is intended to limit the Commonwealth's ability to provide additional liability relief through a Brownfields Covenant Not to Sue Agreement to the extent otherwise authorized by law.

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(2) A Person who has entered into a Brownfields Covenant Not to Sue Agreement with the Commonwealth shall not be liable to Affected Third Parties for claims for contribution, Response Action costs or for property damage pursuant to M.G.L. c. 21E or for property damage under the common law, with respect to matters and properties expressly addressed by the Agreement, provided, however, that the Agreement shall not affect any liability established by contract. A Brownfields Covenant Not to Sue Agreement shall not relieve any Person of liability with respect to any matter or property not expressly addressed by the Agreement.

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(3) The liability protection offered by each Brownfields Covenant Not to Sue Agreement shall be subject to the following conditions:

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(a) the Applicant's compliance with the Release notification provisions established by M.G.L. c. 21E and the MCP (310 CMR 40.0000);

(b) the Applicant's providing reasonable access to the portion of the Site owned or operated by the Applicant to employees, agents, and contractors of the Department of Environmental Protection for all purposes authorized by M.G.L. c. 21E, and to other persons intending to conduct Response Actions pursuant to that chapter and the MCP (310 CMR 40.0000);

(c) the Applicant's responding in a reasonably timely manner to any request made by the Department of Environmental Protection or the Attorney General to produce information as required pursuant to M.G.L. c. 21E;

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(d) the Applicant's taking reasonable steps: (i) to prevent the Exposure of people to Oil or Hazardous Materials by fencing or otherwise preventing access to the Site or portion of the Site under the Applicant's control; and (ii) to contain any further Release or threat of Release of Oil or Hazardous Material from a structure or container under the Applicant's control, upon obtaining knowledge of a Release or threat of Release of Oil or Hazardous Material;

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(e) the Response Actions that the Applicant conducts at the Site being done in accordance with the MCP (310 CMR 40.0000);

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(f) a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, being achieved and maintained at the Site or portion of the Site that is subject of the Agreement within the deadlines set forth in the MCP (310 CMR 40.0000), or within such other deadlines as are specified in the Agreement;

(g) the Response Actions taken at the Site or portion of the Site that is subject to the Agreement meeting the appropriate Standard of Care; and

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(h) such other terms as agreed to by the Applicant in the Agreement.

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(4) No Brownfields Covenant Not to Sue Agreement shall relieve the Applicant of any potential liability the Applicant may have for a Release or Threat of Release of Oil or Hazardous Material:

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(a) that first begins to occur after the Commonwealth's covenant not to sue the Applicant included within said Agreement vests;

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(b) from which there is a new Exposure that results from any action or failure to act by the Applicant pursuant to M.G.L. c. 21E during its ownership or operation of the Site; or

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(c) that violates or is inconsistent with an Activity and Use Limitation established pursuant to M.G.L. c. 21E and the MCP (310 CMR 40.0000).

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(5) Each Brownfields Covenant Not to Sue Agreement that has been entered into with an Applicant who has asserted in his or her application that he or she is an Eligible Person will so indicate, and the liability relief provided by said Agreement shall be subject to the Applicant's being an Eligible Person unless the Agreement expressly states otherwise.

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(6) Each Brownfields Covenant Not to Sue Agreement shall state whether and the extent to which a Subsequent Owner or Operator will be able to make use of the liability relief provided by the Agreement. The liability relief available to a Subsequent Owner or Operator shall be subject to the same terms and conditions as those that apply to the Applicant. Liability relief that is available to an Applicant who has asserted in his or her application that he or she is an Eligible Person shall not be available to a Subsequent Owner or Operator who is not an Eligible Person, unless the Agreement expressly states otherwise.

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(7) Each Brownfields Covenant Not to Sue Agreement shall state when liability relief provided by the Agreement will vest. In no event shall liability relief that would bar claims brought by Affected Third Parties against an Applicant who is not an Eligible Person vest prior to the achievement of a Permanent Solution or Remedy Operation Status for the Site or portion of the Site that is the subject of the Agreement.

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(8) The liability protection offered by each Brownfields Covenant Not to Sue Agreement shall be subject to termination for cause in accordance with 940 CMR 23.09, and each

such Agreement will so state.

23.09: Termination for Cause

(1) In the event that the Attorney General determines that an Applicant submitted materially false or misleading information as part of his or her application, the Attorney General may terminate the liability protection offered by said Agreement in accordance with 940 CMR 23.09(3). A statement made by an Applicant regarding the anticipated benefits or impacts of the proposed project will not be considered false or misleading for purposes of 940 CMR 23.09(3) if such statement was asserted in good faith at the time it was made.

(2) In the event that the Attorney General determines that an Applicant or a Subsequent Owner or Operator has violated the terms and conditions of an Agreement, the Attorney General may terminate the liability protection offered by said Agreement in accordance with 940 CMR 23.09(3). In the event that the liability protection is terminated solely because of a violation of one or more of the conditions set forth in 940 CMR 23.08(3)(a) through (d), by a Subsequent Owner or Operator, such termination shall affect only the liability protection applicable to such Subsequent Owner or Operator.

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(3) Before terminating the liability relief provided by an Agreement, the Attorney General will provide the Applicant or Subsequent Owner or Operator, as appropriate, written notice of the proposed basis for, and a 60-day opportunity to comment on, the proposed termination. The notice from the Attorney General may provide a reasonable period of time for the Applicant or Subsequent Owner, as appropriate, to cure an ongoing violation in lieu of termination of the liability relief provided by an Agreement.

(4) Nothing in 940 CMR 23.09, or in any notice issued pursuant to this section, shall bar or limit the Attorney General, the Department of Environmental Protection, or other Person from seeking any judicial or administrative enforcement of a term or condition of an Agreement.

(5) Termination of liability relief pursuant to 940 CMR 23.09 shall not affect any defense that the Applicant or Subsequent Owner or Operator might otherwise have pursuant to M.G.L. c. 21E, except to the extent that in entering into an Agreement, the Applicant has expressly agreed to waive such defense even in the event of termination of the liability relief provided in such Agreement.

23.10: Severability

If any provision of 940 CMR 23.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 23.00 and the applicability of such provision to other persons or circumstances shall not be affected.

REGULATORY AUTHORITY

940 CMR 23.00: M.G.L. c. 21E, [s. 3A\(j\)\(3\)\(e\)](#).

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An Applicant seeking liability protection against claims for response action costs or contribution brought by third parties pursuant to M.G.L. c. 21E, or for third party claims brought pursuant to that chapter or the common law for property damage, shall provide notice of this intent as follows:

(a) the Applicant shall complete a Notice of Rights of Affected Third Parties on forms provided by the Attorney General and shall submit such completed form to the Attorney General appended to his/her application. Said notice shall identify the Site and Releases at issue, contain a summary of the terms of the application, state how and where copies of the application may be obtained, and state that any persons who choose to do so may, within 90 calendar days, seek to join that Agreement by contacting the Attorney General in a specified manner;

(b) within ten (10) business days of submitting his/her application, the Applicant shall provide a copy of the application together with his/her completed Notice of Rights of Affected Third Parties form either in hand or by registered mail, return receipt, to:

(1) all owners of record in the respective registry of deeds or the appropriate land registration office of the Registry District for the preceding fifty (50) years for all property within the Site;

(2) all Persons who have received a Notice of Responsibility from the Department of Environmental Protection pursuant to M.G.L. c. 21E, § 4;

(3) any Person who has filed for Downgradient Property Status from the Department of Environmental Protection pursuant to 310 CMR 40.0180;

(4) all owners of record of land abutting the Site that is the subject of the Agreement;

(5) any Person who has notified the Applicant that s/he has a potential claim against the Applicant pursuant to M.G.L. c. 21E seeking response action costs or contribution, or a claim brought pursuant to that chapter or the common law for property damage; and

(6) any Person who the Applicant has reason to believe has a potential claim against the Applicant pursuant to M.G.L. c. 21E seeking response action costs or contribution, or a claim brought pursuant to that chapter or the common law for property damage;

(c) within 30 days of submitting his or her application, the Applicant shall cause Notice of Rights of Affected Third Parties to be published in the Environmental Monitor; and

(d) within 45 days of submitting its application, the Applicant shall cause the Notice of Rights of Affected Third Parties to be published in a newspaper published in the municipalities in which the Site lies once per week for three successive weeks. If no newspaper is published in such municipalities, notice may be published in a newspaper with general circulation where the Site is located. A newspaper which by its title page

purports to be printed or published in such municipalities, and having a circulation therein, shall be sufficient for the purpose of providing notice by publication pursuant to 940 CMR 23.06(1)(d).

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- (a) the degree of liability relief that the Applicant is seeking;
- (b) the extent to which the remediation that will be achieved will be a Permanent Solution;
- (c) whether a Permanent Solution, Remedy Operation Status, or Temporary Solution, as applicable, will be achieved for the entire Site on which the proposed Eligible Brownfields Project will be located;
- (d) whether the Applicant is an Eligible Person;
- (e) whether the Applicant, if not an Eligible Person, has accommodated any potentially viable claims that an Affected Third Party may have for property damage; and
- (f) any other factor that the Attorney General deems appropriate in his discretion.